

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RONEEL and NALEEN PRASAD, husband
and wife, and the marital community
composed thereof,

Plaintiffs,

vs.

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY, an insurance
company,

Defendant.

No. C10-762Z

ORDER

THIS MATTER comes before the Court on a second motion to dismiss
defendant's counterclaims filed by plaintiffs Roneel and Naleen Prasad (the "Prasads").
Docket no. 14. Having reviewed the parties' briefing, the Court enters the following
Order.

1 **I. Background**

2 The Prasads are insured under a homeowners' insurance policy issued by
3 defendant American Family Insurance Co. ("American Family"). Am. Compl. ¶ 4.1,
4 docket no. 4. The Prasads filed this lawsuit on April 5, 2010, alleging breach of contract
5 and bad faith by American Family in connection with American Family's denial of an
6 insurance claim filed by the Prasads in February 2009. Not. of Removal, Ex. C (Compl.),
7 docket no. 1.
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9 On motion by the plaintiffs, the Court dismissed the counterclaims brought by
10 American Family in its original answer as unsupported by sufficient facts to state a
11 plausible claim for relief. See Order, docket no. 12. The Court also granted American
12 Family's request for leave to amend its counterclaims for breach of contract and
13 violations of Washington's Consumer Protection Act ("CPA"). Id. Plaintiffs now seek
14 dismissal of these counterclaims in American Family's First Amended Answer. Mot.,
15 docket no. 14.
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18 **II. Discussion**

19 To survive a motion to dismiss, a complaint must contain sufficient factual matter,
20 accepted as true, to state a claim for relief that is plausible on its face. Ashcroft v. Iqbal,
21 129 S. Ct. 1937, 1949 (2009). A claim has facial plausibility when the plaintiff pleads
22 factual content that allows the court to draw the reasonable inference that the defendant is
23 liable for the misconduct alleged. Id. The plaintiff is obligated to provide grounds for
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1 his entitlement to relief that amount to more than labels and conclusions or a formulaic
2 recitation of the elements of a cause of action. Bell Atlantic Corp. v. Twombly, 550 U.S.
3 544, 545 (2007).

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5 Plaintiffs argue that the Court should again dismiss American Family's
6 counterclaims because American Family has not pleaded sufficient facts in its First
7 Amended Answer to state plausible claims for breach of contract or violations of the
8 CPA. Plaintiffs also argue that American Family's reverse CPA counterclaim is not a
9 cognizable cause of action.

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11 **A. American Family's Breach of Contract Counterclaim**

12 American Family's original counterclaim for breach of contract was based only
13 on vague "misrepresentations" purportedly made by the plaintiffs in connection with
14 American Family's investigation of their insurance claim. See Order, docket no. 12.
15 The Court dismissed the claim because it was not supported by sufficient facts to state a
16 plausible claim for relief under Iqbal and Twombly. Id.

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18 In the First Amended Answer, American Family identifies specific
19 misrepresentations allegedly made by the Prasads in connection with their insurance
20 claim, including the Prasads' representations about their (1) property inventory; and (2)
21 when they were last at their home prior to incurring the alleged loss. Am. Answer, Ex. A
22 at 4, docket no. 13. The amended counterclaim contends that under the express terms of
23 the insurance contract, such misrepresentations constitute a material breach of the parties'
24 agreement. Am. Answer at 9, docket no. 13; Id. at Ex. A, 3-4.

1 The Prasads argue that the new facts alleged by American Family are not
2 sufficiently specific to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Mot.
3 at 6, docket no. 14. In particular, the Prasads argue that the amended counterclaim does
4 not identify the specific items misrepresented in the inventory, the relevance of the time
5 the Prasads were last at home prior to the loss, and other particular facts. Id. American
6 Family's amended counterclaim, however, goes beyond a mere recitation of the elements
7 of a claim for breach of contract; it identifies the specific misrepresentations allegedly
8 made by the Prasads that American Family contends constitute breaches of specifically
9 identified provisions of the insurance contract. See Am. Answer, Ex. A at 3-4, docket
10 no. 13. The Court concludes that American Family has met the low threshold of pleading
11 sufficient facts to state a plausible claim for breach of contract, and DENIES plaintiffs'
12 motion to dismiss American Family's breach of contract counterclaim.
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15 **B. American Family's CPA Counterclaim**
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17 To prevail on its amended CPA counterclaim, American Family bears the
18 burden of proving (1) an unfair or deceptive act or practice by the Prasads;
19 (2) occurring in trade or commerce; (3) that affects the public interest; (4) which
20 causes; (5) injury to American Family's business or property. Hangman Ridge
21 Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784, 719 P.2d 531
22 (1986). In the Court's Order dismissing American Family's original CPA
23 counterclaim, the Court identified the type of specific facts that American Family
24 must plead to establish a claim under the CPA.
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1 For example, to establish the “unfair or deceptive act or practice” element of
2 a CPA claim, American Family must plead facts that plausibly show that the
3 Prasads’ conduct had the capacity to deceive a substantial portion of the public.
4 Order at 8, docket no. 12, citing Hangman Ridge, 105 Wn.2d at 785. Yet American
5 Family’s First Amended Answer pleads only that the Prasads made
6 misrepresentations once, in the context of a single private insurance claim.
7 American Family does not allege that plaintiffs have a practice of making similar
8 misrepresentations to others. Cf. Potter v. Wilbur-Ellis Co., 62 Wn. App. 318, 327-
9 28, 814 P.2d 670 (1991) (holding that a false statement communicated to one
10 customer can have the capacity to deceive a substantial portion of the public if it is
11 contained in a standard form contract, sales material, or routine sales presentation).
12 Thus, the misrepresentations alleged in the First Amended Answer are not the type
13 of deceptive conduct that has the capacity to deceive a substantial portion of the
14 public.
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18 Similarly, to plead the public interest element of a CPA claim in a private
19 dispute, American Family must show a likelihood that additional parties have been
20 or will be injured in exactly the same fashion as the plaintiff. Michael v. Mosquera-
21 Lacy, 165 Wn.2d 595, 604, 200 P.3d 695 (2009). “There must be shown a real and
22 substantial potential for repetition, as opposed to a hypothetical possibility of an
23 isolated unfair or deceptive act’s being repeated.” Id. at 604-05. To show the
24 necessary potential for repetition in the context of a private contractual dispute,
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1 American Family must plead facts that establish one or more of the following
2 factors: (1) the alleged acts were committed in the course of the Prasads' business;¹
3 (2) the Prasads advertise to the public in general; (3) the Prasads actively solicited
4 American Family, indicating potential solicitation of other insurance companies; or
5 (4) American Family and the Prasads occupy unequal bargaining positions. See
6 Order at 9 n.5, docket no. 12, citing Hangman Ridge, 105 Wn.2d at 790-91.
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8 American Family's First Amended Answer contains no facts from which the
9 Court may infer that the alleged fraud occurred in the conduct of the Prasads'
10 business, that they advertise to the public, or that they solicited American Family or
11 any other insurance company. With respect to the unequal bargaining factor,
12 American Family argues that, at least in the context of an insurance claim, the
13 insured occupies a stronger bargaining position because only the insured knows
14 whether an insurance claim is accurate at the time it is made. Opp'n at 8, docket
15 no. 21. The Court declines to hold as a matter of law that this information disparity,
16 in a relationship that is otherwise wholly dominated by the insurer, is sufficient, in
17 the absence of any other factors, to establish the public interest element of a CPA
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21 ¹ Factual allegations establishing that the defendant was engaged in business are also
22 relevant to the "trade or commerce" element of a CPA claim, which is defined as "the
23 sale of assets or services, and any commerce directly or indirectly affecting the people
24 of the state of Washington." RCW 19.86.010(2). American Family's First Amended
25 Answer states only that the plaintiffs made fraudulent misrepresentations for "the
26 purpose of making a profit." Am. Answer at 9, docket no. 13. American Family's
conclusory allegation does not establish that the Prasads are "in the business of
insurance," as that phrase is contemplated in RCW 48.01.030, or that they are engaged
in the sale of assets or services or indeed any other type of commerce.

1 claim. Accordingly, the Court concludes that American Family has again failed to
2 plead facts that state a plausible claim for relief under the CPA, and the Court
3 GRANTS the Prasads' motion as to that claim.
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5 **C. Leave to Amend**

6 In the alternative, American Family requests leave to file a second amended
7 answer and counterclaim. Opp'n at 11, docket no. 21. Leave to amend need not be
8 granted if the amendment would be futile. Ventress v. Japan Airlines, 603 F.3d
9 676, 680 (9th Cir. 2010). Plaintiff argues that leave to amend would be futile
10 because a reverse CPA claim brought by an insurer against its insured is not a
11 cognizable legal theory. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699
12 (9th Cir. 1988) (holding that a dismissal under Fed. R. Civ. P. 12(b)(6) can be based
13 on a lack of a cognizable legal theory). Relying heavily on State Farm Fire & Cas.
14 Co. v. Hyunh, 92 Wn. App. 454, 467-68, 982 P.2d 854 (1998), American Family
15 contends that an insurance company may maintain a CPA claim against any party
16 that, for the purpose of making a profit, submits false information in connection
17 with an insurance claim. In Hyunh, the defendant chiropractor falsified treatment
18 records for insured patients and then submitted the falsified records to the plaintiff
19 insurer for reimbursement. Id. The insurer submitted evidence that the same
20 defendant had falsified at least twenty other similar requests for reimbursement. Id.
21 at 469. The court held that the insurance company could pursue a CPA claim
22 against the chiropractor. Id. at 461-62.
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1 As an initial matter, Hyunh is factually distinguishable from the present case.
2 For example, unlike the single misrepresentation alleged in this case, in Hyunh, the
3 defendant's conduct had the capacity to deceive a substantial portion of the public
4 because the plaintiff submitted evidence demonstrating that the defendant had made
5 similar misrepresentations involving at least twenty different patients. Id. at 469.
6 Moreover, unlike in Hyunh, where the evidence of the chiropractor's multiple
7 falsified reimbursement submissions implied a potential for repetition that affected
8 the public interest, American Family's First Amended Answer contains no facts
9 from which the Court may infer a likelihood that other insurers have been or will be
10 injured in exactly the same fashion as American Family. Finally, the Court notes
11 that the defendant in Hyunh was engaged in the operation of a business. Indeed, the
12 court in Hyunh concluded that the insurer was "the direct purchaser" of the
13 defendant's services in that case. Id. at 459. Conversely, there is no dispute that the
14 Prasads are merely purchasers of insurance; they did not provide American Family,
15 or anyone else for that matter, with any goods or services. As such, they are not
16 engaged in any commerce that would give rise to a claim under the CPA.
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19 In addition to being factually distinguishable, Hyunh does not stand for the
20 broad proposition that an insurer may bring a CPA claim against any party that
21 submits false information to an insurer in connection with an insurance claim.
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23 Hangman Ridge and other cases interpreting the CPA make clear that the statute
24 requires some showing that the wrongdoer is involved in business or commerce. It
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1 was with this understanding that the Court originally afforded American Family an
2 opportunity to cure the deficiencies in its counterclaim, with the expectation that
3 American Family might be able to plead the type of facts that would give rise to
4 liability under the CPA. But after a second round of pleading, it is clear that this
5 case involves only a private insurance dispute between a single insured and a single
6 insurance company related to the investigation of a single claim. Such
7 circumstances cannot give rise to liability under the CPA against an insured, and as
8 such, the Court concludes that any further amendment would be futile because
9 American Family cannot plead any additional set of facts that would plausibly show
10 it is entitled to relief under the CPA. Accordingly, the Court DENIES American
11 Family's motion for leave to amend, and DISMISSES its CPA counterclaim with
12 prejudice.²

13 **III. Conclusion**

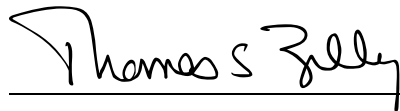
14 The Court GRANTS in part and DENIES in part plaintiffs' second motion to
15 dismiss, docket no. 14. The Court DENIES plaintiffs' motion to dismiss as to
16 American Family's breach of contract counterclaim. The Court GRANTS

21 ² The Court notes that dismissal without leave to amend is also appropriate on
22 procedural grounds because American Family has already had one opportunity to
23 amend the complaint, yet failed to cure the deficiencies in its CPA claim. See Zucco
24 Partners, L.L.C. v. Digimarc Corp., 552 F.3d 981, 1007 (9th Cir. 2009) (holding that a
25 party's failure to plead facts with sufficient particularity, even after the district court
26 has previously granted the party leave to amend with specific instructions about how
to cure the defects in the pleading, is a strong indication that the party has no
additional facts to plead); Metzler Inv. GMBH v. Corinthian Colleges, Inc., 540 F.3d
1049, 1072 (9th Cir. 2008) (holding that a district court has broad discretion to deny
leave to amend where the plaintiff has previously amended the complaint).

1 plaintiffs' motion to dismiss as to American Family's CPA counterclaim. The
2 Court further DENIES American Family's request for leave to amend as to its CPA
3 counterclaim, and DISMISSES that claim with prejudice.
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5 IT IS SO ORDERED.

6 DATED this 14th day of December, 2010.

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10 Thomas S. Zilly
11 United States District Judge
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